STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MANATEE COUNTY SCHOOL BOARD,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 10-3355
	)	
BROOK RAINVILLE,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on September 14, 2010, in Bradenton, Florida, before Elizabeth W. McArthur, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Scott A. Martin, Esquire
Manatee County School Board
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For Respondent: Melissa C. Mihok, Esquire
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STATEMENT OF THE ISSUE

The issue in this case is whether Petitioner has just cause to terminate Respondent's employment.

PRELIMINARY STATEMENT

By letter dated June 2, 2010, the Superintendent of Schools for Manatee County, Tim McGonegal (Superintendent), notified Respondent, Brook Rainville (Ms. Rainville or Respondent), that he intended to recommend her termination from employment for the reasons set forth in an Administrative Complaint served with the letter. The Administrative Complaint, issued by Petitioner, Manatee County School Board (School Board or Petitioner), alleged that Respondent violated School Board Policy 6.2(2)(b)(2) by being excessively absent from work and that this violation constituted just cause to terminate Respondent's employment.

Respondent timely requested an administrative hearing involving disputed issues of material fact. On June 21, 2010, the case was forwarded to the Division of Administrative Hearings for assignment of an Administrative Law Judge to conduct the hearing requested by Respondent. On June 24, 2010, the School Board entered an Order suspending Respondent without pay pending the outcome of the administrative hearing.

As a just-cause termination proceeding authorized by Subsections 1012.33(1)(a) and (6)(a), Florida Statutes (2009),[1] the parties were entitled to proceed to final hearing within 60 days after Respondent's request for an administrative hearing was received pursuant to Subsection 1012.33(6)(a)2., Florida

Statutes. The parties jointly waived the 60-day provision and the final hearing was scheduled, in accordance with the parties' request, for September 14, 2010.

At the final hearing, Petitioner presented the testimony of Debra Horne, Linda Gamble, Rebecca Wells, Wendy Mungillo,[2] Sharon Tarantino, and Tim McGonegal. Petitioner's Exhibits 1 through 8 were received into evidence. Respondent testified on her own behalf and, also, presented the testimony of Alan Valadie, M.D., by deposition. Respondent's Exhibits 1 through 8 were received into evidence.

The Transcript of the final hearing was filed on September 27, 2010. Both parties timely filed Proposed Recommended Orders, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Respondent has been employed by the School Board as a teacher since 1990. For the 2009-2010 school year, Respondent was employed pursuant to a professional services contract as a kindergarten teacher at Rogers Garden Elementary School (Rogers Garden). She was transferred to Rogers Garden from Wakeland Elementary, where she had taught a pre-kindergarten class during the previous school year.

2. The precipitating cause for the Administrative Complaint against Respondent was that during the 2009-2010

school year, out of the 190 school days when Respondent was expected to be at work, she was absent for at least 95 days.[3]

3. The School Board's policy on employee attendance, set forth in Policy 6.2 of the School Board's promulgated Policies and Procedures Manual, has as its basic premise that employees are expected to be present and working at the job site at all times.

4. If an employee is going to be absent from work, authorization is required in the form of sick leave or other approved absence. In general, an employee such as Respondent, accrues ten sick-leave days per ten-month school year. If not used, accrued sick leave accumulates from year to year. "Personal" leave sought for personal reasons, instead of medical reasons, may be requested, and, if allowed, comes out of accrued sick leave. Once an employee runs out of accrued sick leave, the options are either to borrow sick leave from the "sick leave bank," if the employee is eligible, or to request unpaid leave, which may be allowed if the reason is substantiated.[4]

5. Under School Board Policy 6.2(2)(b)(2), if an employee is absent even one day without having obtained authorization, the employee is subject to termination. Under the same policy, even if authorization is obtained for an employee's individual absences, those absences can mount to the point that they become "excessive." By the School Board's policy, excessive

absenteeism, even though authorized, subjects an employee to termination because of the adverse impact on the school, the students, and the other employees.

6. The School Board policies do not adopt any bright-line test quantifying what constitutes "excessive" absenteeism. Instead, the circumstances are considered in each case. As the Superintendent credibly explained, a uniform standard quantifying excessive absenteeism for all School Board employees would not make sense, because the impact varies depending on the position the employee holds. A school district bears a greater adverse impact from absences by a classroom teacher than from absences by most other types of employees. The classroom teacher's ongoing presence is critical to carrying out the school district's educational mission because of the relationships the teacher builds with his or her students. The adverse impact from teacher absences is probably greatest for a kindergarten teacher, because kindergarten students are most vulnerable to harm from disruption in the classroom routine and teacher changeover.

7. The Superintendent explained the factors he considers when assessing a complaint of excessive absenteeism. He would consider whether the employee's absences exceed average absences for other employees. He would review the employee's overall record, including indicators of performance issues or

disciplinary matters. He would consider mitigating circumstances, such as the reasons for the absences. All of these factors would be judged in the context of what position the employee was holding when the absences occurred, so as to consider what adverse impacts were imposed on the school system.

8. Wendy Mungillo, principal of Rogers Garden for the 2009-2010 school year, became concerned about Respondent's attendance by January 2010. The issue was brought to her attention by other teachers who were part of the kindergarten team, because the others were having to pick up the slack. Lesson plans for Respondent's kindergarten class were not always completed to the extent that a substitute could carry them out. Substitutes could not always be arranged quickly enough, so coverage for Respondent's absences had to be provided through the team.

9. By January 15, 2010, Respondent had called in sick on 15 work days, necessitating arrangements for multiple substitutes. No medical documentation was requested for the sick leave up to this point, because the Rogers Garden principal was trying to give Respondent the benefit of the doubt, as is her common practice.

10. Meanwhile, during this first half of the school year, Ms. Mungillo was attempting to evaluate concerns about Respondent's performance in the classroom. The principal had

issued a Notice of Return to Documentation Program to Respondent on September 21, 2009, identifying numerous areas of concern.

11. A Notice of Return to Documentation Program is issued when a principal has concerns about a teacher's performance in the classroom. The notice triggers a process of formal observations in which the principal schedules dates to attend class to observe and evaluate the teacher while teaching in the classroom. For each classroom observation, the principal prepares specific evaluation and feedback, in writing, and then conducts and records a post-observation conference with the teacher.

12. After Respondent was placed on the documentation process, Ms. Mungillo was able to schedule and carry out only one 30-minute in-classroom observation on November 19, 2009, for which a post-observation conference was conducted on December 17, 2009.

13. A follow-up observation was supposed to take place on January 15, 2010, according to Ms. Mungillo's notes on Respondent's attendance, but Respondent called in sick that day.

14. The next time the principal attempted to schedule an observation, she described what happened in a written complaint, as follows:

> On Tuesday, February 9th, I met with Ms. Rainville to discuss several discipline referrals she had written that were

> inappropriate. I discussed with her that I felt like she needed help in her classroom with classroom management. At that time I also set up an observation with her for Friday, February 12th. I told her I wanted to see her teaching math. When I asked her when her math time was, she could not tell me[,] only that it was after lunch. Later that day she wrote me an email that stated the following: "Wendy, I just realized that the day we picked is the school Valentine's Day. I also have company coming from Brazil today. I would rather schedule this next week, please, Brook . . . ."

15. Ms. Mungillo responded to Ms. Rainville's request to cancel and reschedule the classroom observation by stating that she was "not willing to change the date." Ms. Mungillo noted that there was no school-wide Valentine's Day activity planned and asked what Respondent's company from Brazil had to do with her teaching duties.

16. Respondent did not directly respond; instead, she called in sick for February 10, 11, and 12, 2010. In effect, she unilaterally cancelled the scheduled observation after she was unsuccessful convincing Ms. Mungillo to reschedule it.

17. Respondent also missed, with virtually no notice, an important exceptional student education (ESE) staffing meeting, which had been scheduled for February 10, 2010. Respondent was supposed to meet with persons from the ESE department and with the parents of one of Respondent's students to address ESE services for the student or problems the child was having.

Attendance of all participants at these meetings is very important, not only because of the need to timely address the subject of the meeting, but, also, because it is a challenge to coordinate the scheduling of these meetings.

18. Respondent offered no explanation for her absences on February 10, 11, and 12, 2010, either then or at the final hearing. The implication is that she was not at work, because she wanted to spend time with her company from Brazil, while avoiding her classroom observation. Incidentally, her absence caused, at a minimum, disruption to the ESE program, delay in addressing the needs of one of her students, and inconvenience to the parents and others involved in scheduling the meeting.

19. Respondent's absence on February 12, 2010, was of particular concern to Ms. Mungillo. Ms. Mungillo saw a pattern to Respondent's absences, which were timed to avoid scrutiny of Respondent's classroom performance. Ms. Mungillo reasonably became concerned that this pattern was more than just a coincidence.

20. Ms. Mungillo was aware that Respondent had been returned to the documentation process at Wakeland Elementary in the prior school year. At a conference in April 2009, the principal at Wakeland Elementary gave Ms. Rainville a Notice of Return to Documentation Program, identified the areas of concern with Ms. Rainville's classroom performance and outlined

expectations. A memorandum summarizing that conference noted that a formal observation would not take place yet, but that a meeting would be held on May 22, 2009, to review Ms. Rainville's progress.

21. However, on the morning of May 22, 2009, before the progress-review meeting could take place, Respondent had a fall in her classroom. As she explained it, she fell forward over the back end of a rocking chair and hurt her head and her right knee (where she had had knee replacement surgery less than a year earlier). Respondent filed a workers' compensation claim and did not return to work for the remainder of that school year.

22. Because of budget cuts, Respondent's position at Wakeland Elementary was eliminated, and she transferred to Rogers Garden for the beginning of the 2009-2010 school year. Since Respondent never went back to the classroom at the end of the 2008-2009 school year, the Wakeland Elementary principal was never able to evaluate Respondent's classroom performance. There is no performance evaluation in evidence for Respondent for the 2008-2009 school year.

23. Ms. Mungillo attempted to continue the documentation process started at Wakeland Elementary, but as noted, was only able to conduct one 30-minute classroom observation; the next

two times Ms. Mungillo tried to schedule another classroom observation, Ms. Rainville called in sick.

24. As it turned out, February 9, 2010--the day Respondent asked to cancel the scheduled February 12, 2010, classroom observation because of Valentine's Day and company from Brazil--ended up being Respondent's last day at work to teach her kindergarten class in the 2009-2010 school year. So just like in the prior school year at Wakeland Elementary, Respondent's absences interrupted the Rogers Garden principal's ongoing effort to evaluate Respondent's classroom performance. Just as for 2008-2009, no performance evaluation is in evidence for Respondent for the 2009-2010 school year.

25. On Friday afternoon, February 12, 2010, Ms. Rainville contacted the claims adjuster from her 2009 workers' compensation claim. She told him she wanted to re-open her claim for re-treatment because her right knee was hurting. Following a holiday, on February 16, 2010, Ms. Rainville was authorized to have her knee checked. She saw a physician who referred her to an orthopedic specialist and imposed interim work restrictions that would have allowed Respondent to return to work only if she could stay seated there. This was not reasonably possible for a kindergarten teacher, so beginning on February 16, 2010, Respondent was authorized to take workers' compensation leave.

26. On February 25, 2010, Respondent went to the orthopedic specialist to whom she was referred, Dr. Shapiro. He examined Respondent and determined that she had no work-related injury. He also determined that Respondent was able to return to work without any restrictions, despite her knee issue. Dr. Shapiro conveyed the following work instructions for Respondent to the School Board's Risk Management Department: "No Restrictions/full duty work release to job position held prior to this injury." Dr. Shapiro also reported that Respondent has "[a]chieved Maximum Medical Improvement (MMI)" and that Respondent was "[a]ble to return back to work on Monday [March 1, 2010]." Respondent refused to acknowledge these instructions, because she disagreed with the doctor.

27. Despite being medically cleared to return to work, Respondent called in sick on Monday, March 1, 2010, and again on Tuesday, March 2, 2010. Ms. Mungillo called Respondent on Tuesday morning to advise that medical documentation would be required for her absences that week. Ms. Mungillo also told Respondent that she had to know Respondent's intentions for her employment for the rest of the year; if Respondent was going to remain absent, Ms. Mungillo could arrange for a permanent substitute, instead of the multiple substitutes they had been scrambling to arrange on an ad hoc basis each time Ms. Rainville called in sick.

28. On March 2, 2010, Ms. Mungillo submitted her concerns about Respondent's absences, along with Respondent's attendance records thus far that school year, to Debra Horne in the Manatee County School District's Office of Professional Standards (OPS). The OPS is the office that investigates matters of concern involving employees, if the matters could lead to suspension without pay or termination of employment. The OPS initiated an investigation that same day.

29. Respondent's attendance records submitted by Ms. Mungillo to the OPS showed that through March 2, 2010, Respondent had been absent from work on 29 days when she was expected to be at work; on 28 of those days, she should have been teaching her kindergarten class. Instead, 11 different substitute teachers covered Respondent's kindergarten class. When substitutes could not be found quickly enough, other teachers had to provide coverage in addition to their own teaching responsibilities.

30. In an effort to obtain the medical documentation required by Ms. Mungillo for the week of March 1, 2010, on March 4, 2010, Ms. Rainville went to see Dr. Alan Valadie, who had performed knee replacement surgery on Ms. Rainville's right knee in June 2008. He diagnosed "patellar clunk syndrome," which he described in his testimony as development of scar tissue that can occur in patients who had knee replacement

surgery. This scar tissue catches at a point in the range of knee motion and can cause a clicking sound, with or without pain, at that point in the range of motion. The treatment for patellar clunk syndrome is more knee surgery to remove the scar tissue.

31. Dr. Valadie concluded that Ms. Rainville should get the follow-up knee surgery. He filled out a Family Medical Leave Act (FMLA) application form for Ms. Rainville so that she could apply for leave from work in order to have the knee surgery and allow time for post-surgical recovery. On the FMLA application form completed by Dr. Valadie, he responded "no" to the question asking whether the employee is unable to perform any of her job functions due to the condition. However, he indicated that after surgery, she would need a recovery period when she would not be able to work.

32. Dr. Valadie did not indicate on the FMLA application form whether the knee surgery he thought Ms. Rainville needed had already taken place or was scheduled for some future date. However, he specified that Ms. Rainville would require leave from work beginning on March 1, 2010. No ending date was provided despite the form calling for both a beginning and ending date for the requested leave. In total, the application was incomplete and confusing. If Ms. Rainville's pre-surgery knee condition did not render her unable to perform any of her

job functions, then the only possible reconciliation of the responses was that she had had her surgery on March 1, 2010, but the form did not indicate that was the case.

33. Separate from the FMLA form, Dr. Valadie also filled out a "Work/School Status Note," known as a "doctor's note," indicating that he had seen Ms. Rainville on March 4, 2010, and instructing as follows: "Patient is to be off work starting 3-1-2010 until furthur [sic] notice."

34. As confirmed by Dr. Valadie's deposition testimony, both the FMLA form and the doctor's note were misleading. Dr. Valadie made clear that he thought he was filling out both the FMLA form and the doctor's note so that Ms. Rainville could arrange for leave in order to have the knee surgery and to have a period of time off from work after surgery for recovery. But Ms. Rainville did not have her knee surgery until July 9, 2010.

35. Neither Dr. Valadie, nor any other physician, offered any medical justification for Dr. Valadie's statements in the FMLA application and the doctor's note that Ms. Rainville needed to be excused from work beginning on March 1, 2010. Instead, the only evidence in the record related to Ms. Rainville's medical status on March 1, 2010, was that Ms. Rainville was fully cleared medically to return to work.

36. Dr. Valadie did not even see Ms. Rainville so as to diagnose the condition he said needed surgery until March 4,

2010. When he saw Ms. Rainville then, his medical judgment (like that of Dr. Shapiro) was that her knee condition did not interfere with her performing any of her job functions, as he indicated on the FMLA application.

37. When Ms. Rainville submitted the FMLA application form filled out by Dr. Valadie, the school district staff handling those applications began calling Ms. Rainville for additional information, because the form was incomplete and seemingly inconsistent. Most significant to an FMLA request, the application lacked an end date, and it also lacked specific information on when the surgery had been done or was scheduled, so as to justify the beginning date. The staff attempted to get this information from Dr. Valadie, through Ms. Rainville. After several weeks, Ms. Rainville informed staff that Dr. Valadie had said the "end date" should be May 28, 2010, which coincides with the maximum 12-week leave allowed under the FMLA for this kind of request. Dr. Valadie was supposed to submit written confirmation of the medically necessary end date, but there is no such written confirmation in the record, and it appears that none was ever submitted. Ms. Rainville never responded to the staff's telephone requests for information regarding the surgery that was the basis for the leave request, such as whether it had occurred yet, and, if so, when.

38. After these unsuccessful efforts to obtain complete information through telephone calls with Respondent, on May 5, 2010, Respondent was given written notice of the continued deficiencies in the FMLA application and documentation with one final chance to provide the missing information. When no revised application or additional information was received, on May 17, 2010, the FMLA request was finally denied.

39. After Respondent conveyed an "end date" for her leave request, which she said she obtained in a phone conversation with Dr. Valadie, even though no written confirmation had been received yet from Dr. Valadie, on March 11, 2010, Ms. Mungillo signed an authorization for Respondent to take a regular (non-FMLA) unpaid leave of absence from school from March 1, 2010, until May 28, 2010. This allowed Ms. Mungillo to hire a permanent substitute for Respondent's kindergarten class. Ms. Mungillo authorized this leave because of the apparent medical necessity indicated by Dr. Valadie, even though the explanation remained confusing and inconsistent.

40. Ms. Mungillo learned for the first time at the final hearing that Ms. Rainville did not have knee surgery until July 9, 2010, and that as of the final hearing date (approximately one month into the 2010-2011 school year), Ms. Rainville claimed she had not yet recovered to the point of being able to return to work. Ms. Mungillo testified credibly

and without hesitation that she would not have approved Ms. Rainville's leave of absence from March 1, 2010, if she knew that Dr. Valadie did not think any leave of absence from work was medically necessary until the knee surgery was actually performed, which was not until July 9, 2010. Since the authorization for Ms. Rainville's leave of absence was obtained through misleading statements, that leave of absence should be considered unauthorized. At the very least, the leave of absence for the period of March 1, 2010, through May 28, 2010, was insufficiently documented with evidence of medical necessity for the entire period of time.[5]

41. Finally, to complete the school year, Pat Barber, Ms. Rainville's union representative, submitted another sick leave request for Ms. Rainville from June 1, 2010, through June 10, 2010, the last day of school. Ms. Mungillo gave her conditional approval, subject to receipt of a doctor's certification within five days.

42. Ms. Barber submitted a prescription for Ms. Rainville apparently signed by Daniel Small, M.D., of the Sarasota Arthritis Center, stating as follows: "Off work 5/28/10→6/10/2010 due to continuing health problems. She is unable to perform her duties as a teacher at this time." No medical documentation or additional information was provided, such as when Ms. Rainville saw Dr. Small, what "health problems"

were referred to, or how they interfered with Ms. Rainville's duties as a teacher. While Ms. Rainville's testimony at final hearing seemed to indicate that she was suffering from knee pain, she did not explain why she went to a different doctor, instead of the doctor whose care she was under for her knee condition and who ultimately performed the surgery.

43. Upon the conclusion of the OPS investigation into Respondent's absenteeism, the results were presented to a panel comprised of persons within Respondent's chain of command, and the panel unanimously recommended to the Superintendent that Respondent's employment be terminated for violating the School Board policy against excessive absenteeism. Though not bound by the panel's recommendation, the Superintendent concurred and recommended that Respondent be terminated from employment.

44. The Superintendent reasonably considered Respondent's overall record. While Respondent had favorable evaluations and professional development plans up through May 2008, the Superintendent took note of the performance concerns over the last two school years. He reasonably considered the mid-stream performance evaluations that were being attempted under the Return to Documentation process at both Wakeland Elementary and Rogers Garden, both of which were thwarted by Respondent's absences for the remainder of each school year. The Superintendent also took note of two written disciplinary

reprimands issued to Respondent, one in December 2008 at Wakeland Elementary and the next in January 2010 at Rogers Garden.

45. The Superintendent also reasonably considered Respondent's history of absenteeism as far back as records were available, beginning in the 1993-1994 school year after Respondent had been teaching for three years. Many of these years reflect substantially more than the amount of paid leave time Respondent could have been entitled to, even if she had taken no paid leave whatsoever during her first three years of employment.

46. For example, in school year 1999-2000, Respondent used more than twice the number of sick leave days than she accrued that year. She did not have sufficient sick leave days accrued from prior years, because she was docked for two days' pay.

47. Again in the very next year, Respondent took more days off than she was entitled to and was docked for another four days of pay. This pattern continued with Respondent's pay docked for excess absences beyond authorized paid leave in 2001-2002, 2003-2004, 2006-2007, and every year since then.

48. The magnitude of Respondent's absences in prior years pales in comparison to the 2009-2010 school year. Indeed, the testimony of several witnesses with many years of experience handling these types of matters, including Superintendent

McGonegal, was that Respondent's absences greatly exceeded most anything they had ever seen before. The absences were described as "at the top" in terms of excessiveness.

49. Respondent attempted to establish that she was being singled out for harsher treatment than others who had also been absent a lot. However, no credible evidence was presented of any incidents of absenteeism that were sufficiently similar to Respondent's to be considered comparable. That the School Board may have taken no disciplinary action against employees who took more than ten days of sick leave in a single school year, fails to establish any inequity in the proposed treatment of Respondent here. Respondent's 2009-2010 absences are of a magnitude that is nearly ten-fold more than the attempted comparison. The fact remains that Respondent's 2009-2010 absences, even if all authorized legitimately (as was found not to be the case), easily meet or exceed any reasonable definition of excessive. No similar case was shown to exist.

50. The Superintendent also reasonably considered the progressive discipline approach apparently incorporated into the Collective Bargaining Agreement (CBA) between the School Board and MEA. The Superintendent explained that the progressive discipline policy, while preferred, is not required as a lock-step approach in every case.

51. If the idea of progressive discipline is to allow an employee to conform their conduct before receiving harsher consequences, that would not have worked here, since most of Respondent's absences were supposedly due to legitimate medical issues. If Respondent was truly unable to come to work, warning her that she may be terminated if she continued to be absent, would not change her inability to come to work. In addition, Respondent made it impossible to address concerns about her mounting absences in performance evaluations because Respondent kept calling in sick when her performance evaluations were scheduled. Finally, the Superintendent reasonably considered and rejected the lesser disciplinary step of suspension without pay, because Respondent had already chosen to be absent without pay. Under these circumstances, the Superintendent reasonably determined that he had the discretion to proceed to termination within the parameters of the progressive discipline policy. No evidence was presented to establish any different requirement.

CONCLUSIONS OF LAW

52. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2010).

53. In this proceeding, Petitioner seeks to terminate Respondent's employment. Petitioner bears the burden of proof, and the standard of proof is by a preponderance of the evidence.

McNeill v. Pinellas County School Board, 678 So. 2d 476, 477 (Fla. 2d DCA 1996); Dileo v. School Board of Dade County, 569 So. 2d 883 (Fla. 3d DCA 1990).

54. The Superintendent has the authority to recommend termination of instructional personnel, such as Respondent, to the School Board. § 1012.27(5), Fla. Stat.

55. The School Board has the authority to terminate instructional personnel pursuant to Subsections 1012.22(1)(f) and 1012.33(6)(a), Florida Statutes.

56. "Just cause" is the standard established for termination of instructional personnel pursuant to Subsection 1012.33(1)(a), Florida Statutes, as well as School Board Policy 6.11 and the CBA between the School Board and the MEA, of which Respondent is a member.

57. Subsection 1012.33(1)(a), Florida Statutes, sets forth a non-exclusive list of factors that may constitute "just cause." The School Board has discretion in setting standards for what constitutes "just cause" for taking disciplinary action against employees, including termination. See Dietz v. Lee County School Board, 647 So. 2d 217, 218 (Fla. 2d DCA (1994) (Blue, J. concurring); see also § 1012.23(1), Fla. Stat. (authorizing district school boards to adopt rules governing personnel matters, except as otherwise provided by law or the State Constitution).

58. Pursuant to School Board Policies 6.11(1) and 6.11(12)(c), just cause for termination from employment includes "violation of the Policies and Procedures Manual of the School District of Manatee County[.]"

59. The Administrative Complaint charges Respondent with violating School Board Policy 6.2(2)(b)(2), which provides as follows:

> Any absence from work without leave or excessive absence with notice may be considered grounds for termination. All employees are expected to be in attendance at work sites at all times. Excused absences are the only exception to this. Excessive absences even though excused, have an adverse impact.

60. The School Board's policy regarding excessive absenteeism is reflected in other sections of the Policies and Procedures Manual, with a slightly different emphasis. The introductory language to School Board Policy 6.2 under the heading, "Procedures," states as follows: "Excessive absenteeism, even though excused, has an adverse impact on performance and is an issue to be addressed in performance evaluation affecting continuing employment." Similar language is set forth in School Board Policy 6.11(3)(d) (District Rules of Work, Absence of Employees).

61. Respondent focuses only on the latter policy language to argue that the School Board was required to raise the issue

of Respondent's excessive absenteeism in performance evaluations, but failed to do so. However, School Board Policy 6.2(2)(b)(2), which is the one Respondent is charged with violating in the Administrative Complaint, plainly provides that excessive absenteeism may be grounds for termination. Respondent's argument that the School Board was required to first raise Respondent's mounting absenteeism in a performance evaluation before applying the discipline authorized by School Board Policy 6.2.(2)(b)(2), must be rejected, particularly under the circumstances proven in this case where Respondent's repeated absences interfered with an ongoing return to the documentation performance evaluation process. Simply put, Respondent's performance could not be evaluated when Respondent was never there teaching.

62. Respondent also argues that termination is not available as discipline because Respondent's absences were authorized. That argument must be rejected as contrary to the School Board's policy. Excessive absences, even though authorized, have an adverse impact and may be grounds for termination. The focus of this policy is on the harm and disruption caused by Respondent's chronic and excessive absenteeism. The kindergarten students in Respondent's class were deprived of consistency in routine and a solid relationship with their teacher, and, instead, were forced to endure the

constant change in teaching styles and routine when Respondent's ad hoc absences through the beginning of March, left the class with 11 different substitute teachers in between Respondent's occasional teaching presence. Respondent's colleagues were forced to take up the slack for Respondent. The school system was required to put additional resources into constantly scrambling to make arrangements for Respondent's classes. In addition, the lingering concerns over a two-year period about Respondent's classroom performance never could be fully evaluated or addressed because, legitimate or not, Respondent's absences meant that she was not in the classroom teaching to be evaluated.

63. Moreover, as found above, the authorization for many of Respondent's absences was obtained by using a misleading doctor's note. Had the truth been known, Respondent's absences would never have been authorized. The absences were not adequately documented with evidence of medical necessity as required by the CBA. As such, Respondent's absences could well be considered unauthorized for purposes of applying the School Board Policy 6.2(2)(b)(2), which provides that a single unauthorized absence is sufficient grounds for termination.

64. Respondent also argues that the denial of her FMLA application was questionable. This argument is rejected. The evidence established that the FMLA application was properly

denied as incomplete and inconsistent. Despite giving Respondent ample opportunity informally and formally to complete and clarify the application, Respondent never gave adequate information. On hindsight, that failure makes sense, because accurate information clarifying the application's inconsistencies would have confirmed that the application was not approvable. Plainly put, Dr. Valadie did not believe that Respondent had any serious health condition requiring leave from work in March 2010. Rather, he made clear that leave from work would not be medically necessary until Respondent had the knee surgery and for a period of time after the surgery for recovery. The incompleteness and inconsistencies in the FMLA application form hid the real problems with the application and could not have been corrected or clarified in a way to make the application approvable.

65. Respondent does not really dispute that the magnitude of Respondent's absences in the 2009-2010 school year were excessive. By any reasonable definition of "excessive absenteeism," Respondent's 2009-2010 work attendance record plainly qualifies, even if most of the absences had been based on legitimate medical issues. See School Board of Dade County v. Burton, Case No. 84-3584 (DOAH June 20, 1985; Final Order Sept. 4, 1985) (Respondent's absences, notwithstanding the fact that most were legitimate, were clearly excessive and sufficient

grounds for dismissal, impairing her effectiveness in the school system and depriving her pupils of minimal educational experience); accord Dade County School Board v. Schlecker, Case No. 78-1074 (DOAH Oct. 25, 1979; Final Order Jan. 9, 1980). ("Respondent's absences, notwithstanding the fact that most were legitimate, considered with the fact that there is no reason to believe that the chronic absenteeism will cease and the fact that these absences disrupt the business of the school system and cause hardship to the taxpayers as well as Respondent's students, is sufficient grounds for dismissal of Respondent[.]").

66. The lack of a quantified bright-line test for the School Board's "excessive absenteeism" standard is appropriate in that it allows for consideration of all the circumstances. Wright v. Department of Children and Families, 712 So. 2d 830, 831 (Fla. 3d DCA 1998)(court should consider all the circumstances surrounding the employee's absences in determining whether employee has been excessively absent so as to justify the discharging employee).

67. Respondent argues that the proposed termination is contrary to the progressive discipline policy, which is derived from the CBA. Although Respondent introduced into evidence other excerpts of the CBA, no evidence was presented of the CBA's terms regarding progressive discipline. Therefore, it is

impossible to conclude that the proposed termination violates any progressive discipline terms that may be in the agreement.

68. The Superintendent's testimony established that his recommendation that Respondent's employment be terminated is consistent with his understanding of the progressive disciplinary policy. As the Superintendent explained, while progressive discipline is encouraged, rigid adherence to each step in the progression is not required. Instead, there is discretion in every case to consider the circumstances, and in exceptional circumstances, termination may be warranted, even though lesser disciplinary measures were not imposed. Those exceptional circumstances exist here, as explained in the Findings of Fact above.

69. Petitioner met its burden of proving, by a preponderance of the competent, substantial, and more credible testimony and evidence, that Respondent violated School Board Policy 6.2(2)(b)(2), as charged in the Administrative Complaint. Respondent's absences in the 2009-2010 school year alone, even if authorized, where plainly excessive. The adverse impact of a kindergarten teacher being gone from the classroom as much as, or more than, she was there cannot credibly be disputed.

70. Given the extraordinary magnitude of Respondent's absences, the fact that lesser penalties would not be appropriate for the violation and the fact that Respondent

secured approvals for more than half of her absences by using a misleading doctor's note, termination is appropriate and fully justified.

71. Petitioner has established by a preponderance of the competent, substantial, and more credible evidence that there is just cause for Respondent's termination.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is:

RECOMMENDED that Petitioner, Manatee County School Board, enter a Final Order terminating Respondent, Brook Rainville's, employment.

DONE AND ENTERED this 28th day of October, 2010, in Tallahassee, Leon County, Florida.

ELIZABETH W. MCARTHUR
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of October, 2010.

ENDNOTES

[1/] Unless otherwise indicated, all references to the Florida Statutes are to the 2009 version.

[2/] Ms. Mungillo's name was Wendy Acosta when the documentary evidence of record was created. She changed her name when she got married at some point before the final hearing. Throughout this Recommended Order, she will be referred to by her current name for convenience, recognizing that she is referred to by her former name in the exhibits.

[3/] At the final hearing, the unrebutted testimony of numerous witnesses was that through the end of the school year, Respondent's absences totaled 95 days. However, according to Petitioner's Proposed Recommended Order, five additional days (categorized at "docked" days for which Respondent was not paid because she was absent) were left out of the 95-day total. It is unnecessary to resolve this apparent discrepancy, because there is no dispute that Respondent was absent for at least 95 days, representing one-half of the entire school year; the additional five days would not materially affect the recommended findings or conclusions herein.

[4/] The CBA between the School Board and the MEA, of which Respondent is a member, confirms that a teacher is entitled to ten days of paid sick leave per ten-month school year, available when the teacher is unable to perform duties because of illness. Personal leave may be available with 24 hours' notice, out of accumulated sick leave. Additional unpaid leave for illness must be "satisfactorily substantiated by medical evidence . . . [with] satisfactory documentation for the necessity for such leave . . . [and with] beginning and ending dates of such leaves . . . based on medical opinion."

[5/] Arguably, Respondent sufficiently documented the medical necessity for leave for the period from March 19, 2010, through April 6, 2010, during which time there was eight school days. After Respondent was medically cleared to return to work on March 1, 2010, by workers' compensation orthopedic specialist Dr. Shapiro, Respondent exercised her right under the workers' compensation laws to a one-time change in her treating physician. On March 19, 2010, Respondent saw Dr. Shortt, who thought a bone scan was needed. In the interim, he thought Respondent could go back to work with some restrictions, such as no kneeling, no squatting, and no lifting of more than 20 pounds--less than the "sitting only" restrictions imposed in

February by the general workers' compensation physician, but still too restrictive for a kindergarten teacher. Therefore, Respondent was on approved workers' compensation sick leave from March 19, 2010, until April 6, 2010. On April 6, 2010, after Respondent had her bone scan, Respondent saw Dr. Shortt again, who adopted Dr. Valadie's diagnosis of patellar clunk syndrome. However, he disagreed with Dr. Valadie that the primary cause was more likely than not Respondent's classroom fall on May 22, 2009. Instead, his opinion was that the syndrome was probably the result of Dr. Valadie's knee replacement surgery. Based on Dr. Shortt's assessment, Respondent's workers' compensation claim was denied, and Respondent was referred back to Dr. Valadie. Dr. Valadie did not communicate any change in his opinion that Respondent was able to work, notwithstanding her knee condition, up to the time of her knee surgery. Dr. Valadie performed the knee surgery on July 9, 2010.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.